

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs December 2, 2008

**STATE OF TENNESSEE v. CYRUS RANDY WHITSON**

**Direct Appeal from the Criminal Court for Davidson County**  
**No. 2005-D-3215     Mark J. Fishburn, Judge**

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**No. M2007-02197-CCA-R3-CD - Filed November 12, 2009**

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The Defendant-Appellant, Cyrus Randy Whitson (“the defendant”), was convicted of first degree premeditated murder and sentenced to life imprisonment. On appeal, he argues: (1) the insufficiency of the evidence; (2) the trial court erred by not declaring a mistrial when a State’s witness revealed to the jury that the defendant had been in jail; (3) the trial court erred by allowing a State’s witness to testify as to the contents of a statement given by the defendant that was not provided to the defendant in discovery; (4) the trial court erred by not determining the defendant’s competency before trial; and (5) the trial court erred by finding the defendant guilty based upon a defective indictment. Following our review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, and J. C. McLIN, JJ, joined.

Michael Colavecchio (at trial) Nashville, Tennessee; J. Chase Gober (on appeal) Nashville, Tennessee, for the Defendant-Appellant, Cyrus Randy Whitson.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Bell, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Jennifer Stribbling and Sarah Davis, Assistant District Attorneys General, for the Appellee, State of Tennessee.

**OPINION**

**Facts.** In the early morning hours of December 2, 2004, the victim, Eric Williams, was shot and killed. At trial, Shawanna Bolden testified that she had known brothers Kim, Geatano, and Cyrus Whitson, the defendant, for twelve years. On the night of the offense, Bolden was picked up in a van by Kim and Geatano at her aunt’s house. They intended to take her to a bail bondsman because her boyfriend was in jail. Kim was driving and Geatano sat in the passenger seat. They stopped to pick up the defendant who sat in the back seat next to Bolden. Bolden testified that the defendant wore a black dress, pumps, and a hair weave. She noticed that the defendant had a small gun at his mid-section secured by his undergarments. Bolden said the defendant told her that the gun was for his protection.

After picking up the defendant, Kim drove to a bar. Initially, only the defendant entered the bar; however, after several minutes, Kim, Geatano, and Bolden also went inside. Bolden said they were inside the bar for three or four minutes before they all returned to the van.

Upon leaving the bar, the defendant told Kim to stop at a motel, but did not say why he wanted to stop there. Kim parked at the back end of a motel, and the defendant got out of the van. Bolden said she was not able to see where the defendant went. After roughly one minute, Geatano and Kim left the van to check on the defendant. About twenty seconds later, the three brothers rushed back to the van. The brothers were arguing loudly, and Bolden described the defendant as “hysterical”. Bolden heard the defendant threaten to kill Geatano if he said anything about what happened. She said the defendant also stated, “Y’all better not say nothing, and that he would take his own charge.” Bolden testified that Kim asked the defendant, “Why did you kill him for?” She did not see any of the brothers with a gun. Before the brothers returned to the van, she heard something that sounded like a gunshot, but she was not certain.

After leaving the motel, the defendant was dropped off at his aunt’s house. Bolden remained in the van while Kim drove to Geatano’s apartment. Kim and Geatano went inside the apartment, and Bolden could hear the brothers “arguing and shouting for about ten or fifteen minutes.” Kim returned to the van and drove Bolden to the restaurant where she worked.

The victim’s girlfriend, Martha Bassham, testified that she called him several times after midnight on December 2, 2004, but he did not answer. Bassham called the facility where he worked, but she was told he was not there. She had a friend take her to the motel where she said the victim had been living for between six and eight months. The victim’s car was parked in front of his room. Bassham knocked on the victim’s door, but he did not answer. A motel employee unlocked the door for Bassham. Upon entering, Bassham said she “could see [the victim’s] head and his hands sticking out from behind the bed, he was laying face down on the floor.” After determining the victim was dead, she left the room and called for help.

The detective who investigated the shooting testified that he found the victim laying face down on the floor next to his bed. The victim’s hands were above his head, and a cigarette butt was next to his fingertips. A gunshot wound was on the back of the victim’s head. The detective found no signs of a struggle or forced entry. The phone cord had been pulled from the wall and no weapons were found in the room. The police did not recover the murder weapon.

An officer with the technical investigation division also concluded that there was no evidence of forced entry. The officer found blood on the victim’s hands, which he stated was spatter from a gunshot wound or aspirated blood. He determined that the victim’s hands were close together when the blood stain developed. He found a pair of scissors outside of the victim’s motel room.

A forensic pathologist performed the autopsy of the victim and concluded the victim died of a gunshot to the back of the head. The fatal wound was an inch and a half below the top of his head.. She concluded that the bullet was fired from a small caliber gun within a couple of inches of the victim’s skull. Based on the path of the bullet, her opinion was that the person who shot the victim was standing behind him. The forensic pathologist noticed a small abrasion or scratch on the victim’s foot. She saw no other signs of physical injury to the victim’s body.

Kim Whitson's attorney hired a private investigator who interviewed the defendant on January 13, 2006. The defendant did not give a recorded statement; however, the private investigator took notes from his discussion with the defendant. The State called the private investigator as a witness at the defendant's trial. Over the defendant's objection, the private investigator read his notes from his discussion with the defendant to the jury at trial. The defendant told the private investigator that he had gone to the motel to engage in prostitution and not to collect a debt. The defendant said he met the victim earlier in the day, and the victim asked if the defendant "dated." The defendant stated that the victim allowed him to enter his motel room and stated that he would pay for sex. The defendant said he (the defendant) had a gun in his purse. Upon entering the motel room, the defendant saw that the victim had "a little gun with two barrels." The defendant stated that he had previously told the victim that he was a transvestite; however, the victim became angry when he discovered that the defendant was a man. The defendant said the victim dived at him and they "got to scrapping." The defendant explained that he was hitting the victim with a gun when it accidentally went off. Kim and Geatano then entered the room. The defendant said he was going to call the police but Kim pulled the phone out of the wall. The defendant sold the gun after the incident. From the private investigator's notes, it is unclear which gun, according to the defendant, was fired and later sold. The defendant told the private investigator that he did not intend to kill the victim.

A firearms expert testified that it is possible for a gun to fire if dropped or hit against a hard object. The expert stated, however, that without a finger on the trigger, it is extremely unlikely for a gun to accidentally go off, provided the gun had not been altered.

The jury convicted the defendant of first degree premeditated murder. The felony murder charge was dismissed.

## ANALYSIS

**I. Sufficiency of the Evidence.** The defendant claims that his conviction was not supported by sufficient evidence because the proof at trial failed to show that he killed the victim intentionally or with premeditation. The State argues that the proof at trial was sufficient to support the defendant's conviction. We agree with the State.

The State, on appeal, is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). When a defendant challenges the sufficiency of the evidence, this court must consider "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Similarly, Rule 13(e) of the Tennessee Rules of Appellate Procedure states, "Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support a finding by the trier of fact of guilt beyond a reasonable doubt." The requirement that guilt be found beyond a reasonable doubt is applicable in a case where there is direct evidence, circumstantial evidence, or a combination of the two. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990) (citing State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977) and Farmer v. State, 343 S.W.2d 895, 897 (Tenn. 1961)). The trier of fact must evaluate the credibility of the witnesses, determine the weight given

to witnesses' testimony, and must reconcile all conflicts in the evidence. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996).

When reviewing issues regarding the sufficiency of the evidence, this court shall not "reweigh or reevaluate the evidence." State v. Philpott, 882 S.W.2d 394, 398 (Tenn. Crim. App. 1994) (citing State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978), superseded by statute on other grounds as stated in State v. Barone, 852 S.W.2d 216, 218 (Tenn.1993)). This court has often stated that "[a] guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997) (citation omitted). A guilty verdict also "removes the presumption of innocence and replaces it with a presumption of guilt, and the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict." Id. (citation omitted).

According to Tennessee Code Annotated section 39-13-202(a)(1), first degree murder includes the "premeditated and intentional killing of another." Premeditation is defined, under subsection (d), as follows:

As used in subdivision (a)(1) "premeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

T.C.A. § 39-13-202(d) (2004). A person's actions are "intentional" if it is the person's "conscious objective or desire to . . . cause the result." T.C.A. § 39-11-106(a)(18) (2004).

The Tennessee Supreme Court has stated that "premeditation may be established by any evidence from which a rational trier of fact may infer that the killing was done 'after the exercise of reflection and judgment' as required by Tennessee Code Annotated section 39-13-202(d)." State v. Davidson, 121 S.W.3d 600, 615 (Tenn. 2003). The Court identified the following factors as supporting a finding of premeditation:

the use of a deadly weapon upon an unarmed victim; the particular cruelty of a killing; the defendant's threats or declarations of intent to kill; the defendant's procurement of a weapon; any preparations to conceal the crime undertaken before the crime is committed; destruction or sequestration of evidence of the killing; and a defendant's calmness immediately after a killing.

Id. (citing Bland, 958 S.W.2d at 660). These factors, however, are not exhaustive. Id. The trier of fact may also consider evidence of the defendant's motive and the nature of the killing. State v. Nesbit, 978 S.W.2d 872, 898 (Tenn. 1998).

We hold that the evidence, when examined in the light most favorable to the State, was sufficient to support the jury's finding that the defendant's actions were premeditated and intentional. Bolden testified that the defendant had a small handgun shortly before the shooting. She said the defendant asked his brother to stop at the motel where the defendant exited the van. Bolden testified that the defendant returned to the van less than two minutes later. She said he yelled, "Y'all better not say nothing, and that he would take his own charge."

The forensic pathologist, the officer from the technical investigation division, and the investigating detective presented evidence about the nature of the killing which tended to show that the victim's death was premeditated and intentional. The forensic pathologist concluded that the victim was shot in the back of the head by a smaller caliber gun. She testified that the bullet was fired from within a couple of inches of the victim's skull. She believed the victim was shot by someone standing behind the victim. The forensic pathologist also stated that the victim's body showed no other signs of physical injury except a small abrasion on his foot. The officer from the technical investigation division testified that there was blood spatter on the victim's hands that could have been from the gunshot, and which developed while the hands were close together. The detective found the victim lying face down on the floor with his hands above his head and a cigarette butt next to the victim's fingertips. The detective said there was no evidence of a struggle or forced entry. The detective did not find a weapon in the motel room, but he did see that the phone cord had been cut. The officer found a pair of scissors outside of the motel room.

Based on the proof at trial, a rational jury could have found that it was the defendant's conscious objective to kill the victim, and that he did so after the exercise of reflection and judgment. The defendant is not entitled to relief on this issue.

**II. Mistrial.** The defendant argues that the trial court erred by not declaring a mistrial when a witness disclosed that the defendant had been in jail. The State contends that this issue is waived because the defendant did not object to the witness' statements at trial or move for a mistrial when the statements were made. The State also asserts that the trial court did not abuse its discretion by not declaring a mistrial.

The grant or denial of a motion for a mistrial rests within the sound discretion of the trial court. State v. Robinson, 146 S.W.3d 469, 494 (Tenn. 2004). A trial court should declare a mistrial "only upon a showing of manifest necessity." Id. (citing State v. Saylor, 117 S.W.3d 239, 250-51 (Tenn. 2003)). "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." State v. Reid, 164 S.W.3d 286, 341-42 (Tenn. 2005) (citing State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996)). This court will not reverse the trial court's denial of a motion for mistrial "absent a clear showing that the trial court abused its discretion." Robinson, 146 S.W.3d 469, 494 (citing State v. Reid, 91 S.W.3d 247, 279 (Tenn. 2002)). The party seeking a mistrial has "the burden of establishing the necessity of a mistrial." Reid, 164 S.W.3d at 342 (citing Williams, 929 S.W.2d at 388).

We agree with the State that the defendant waived this issue because he did not object to the witness' statements at trial or move for a mistrial when the statements were made. See T.R.A.P. 36(a); State v. McPherson, 882 S.W.2d 365, 373 (Tenn. Crim. App. 1994); State v. Thomas, 818

S.W.2d 350, 364 (Tenn. Crim. App. 1991); State v. Robinson, 971 S.W.2d 30, 42-43 (Tenn. Crim. App. 1997). Waiver notwithstanding, our review of the record shows that the trial court instructed the jury to disregard the witness' responses about the defendant's communications from jail. We are to presume that the jurors followed the instructions of the trial court. See State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998). The trial court did not abuse its discretion by not declaring a mistrial. For these reasons, the defendant is not entitled to relief on this issue.

**III. Discovery.** The defendant argues the trial court erred by allowing the private investigator to read notes taken by the private investigator that contained statements of the defendant. The defendant claims this testimony should not have been admitted because the State failed to provide a copy of the notes to the defendant during discovery. The State contends this issue is waived because it was not included in the defendant's motion for new trial. The State also asserts that the defendant failed to show the existence of plain error.

This issue is waived because it was not included in the defendant's motion for new trial. See T.R.A.P. 3(e); State v. Wyrick, 62 S.W.3d 751, 786 (Tenn. Crim. App. 2001). Thus, the defendant is not entitled to relief unless allowing the private investigator to read his notes constituted plain error. See Tenn. R. Crim. P. 52(b). "The defendant bears the burden of persuading the appellate court that the trial court committed plain error and that the error was of sufficient magnitude that it probably changed the outcome of the trial." State v. Banks, 271 S.W.3d 90 (Tenn. 2008) (citing State v. Bledsoe, 226 S.W.3d 349, 354-55 (Tenn.2007)). In State v. Adkisson, this court stated that in order for an error to be considered plain:

- (a) the record must clearly establish what occurred in the trial court;
- (b) a clear and unequivocal rule of law must have been breached;
- (c) a substantial right of the accused must have been adversely affected;
- (d) the accused did not waive the issue for tactical reasons; and
- (e) consideration of the error is "necessary to do substantial justice."

899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (citations omitted). All five factors must be shown, and it is not necessary to consider every factor if it is obvious that one of the factors cannot be established. State v. Smith, 24 S.W.3d 274, 282-83 (Tenn. 2000). Here, the defendant claims the private investigator should not have been permitted to testify regarding his notes because of a discovery violation. Rule 16(a)(1)(A) of the Tennessee Rules of Criminal Procedure governs the State's disclosure of a defendant's oral statement. It provides "[u]pon a defendant's request, the state shall disclose to the defendant the substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at the trial[.]" Tenn. R. Crim. P. 16(a)(1)(A). Rule 16 also requires the state to disclose written or recorded statements to the defendant, "if (I) the statement is within the state's possession, custody, or control; and (II) the district attorney general knows--or through due diligence could know--that the statement exists[.]" Tenn. R. Crim. P. 16(a)(1)(B)(i).

The following exchange occurred prior to the private investigator's testimony regarding the defendant's statements:

DEFENSE COUNSEL: I was never given copies of these in discovery, and I am not sure if it would be considered discoverable pursuant to Rule 16, to be honest with you.

STATE: We didn't have copies of this.

THE COURT: I don't believe (indiscernible) by Rule 16 not working for a government agency or an agent of the District Attorney General's office or law enforcement.

DEFENSE COUNSEL: But would they - -

THE COURT: (Indiscernible), in fact, (indiscernible), court appointed - -

DEFENSE COUNSEL: Yeah.

THE COURT: (Indiscernible), to assist in the representation of Kim Whitson, and it actually would be a work product of that attorney to make (indiscernible), force that information to be given over. I do think that , just for the record, --

DEFENSE COUNSEL: That is what I want.

THE COURT: - - was brought before, by Mr. Frogge, Kim Whitson's attorney, in support of a bond hearing, wherein, Mr. Berry testified (indiscernible). I don't think there is anything in the record or his personal notes that were made an exhibit or otherwise requested (indiscernible) Mr. Frogge (indiscernible).

STATE: And we got permission from Mr. Frogge for Mr. Berry to bring his notes and to allow us to see them this morning.

THE COURT: I am going to allow it.

Based on the above exchange, the State turned the investigator's notes over to the defense on the day they became aware of them. The record simply does not bear out a discovery violation. Moreover, given the strength of the State's case, the defendant offers no explanation for how prior discovery of the investigator's notes would have affected the outcome of the trial. He is not entitled to relief on this issue.

**IV. Competency.** The defendant argues the trial court erred by not determining his competency before trial. The defendant claims he was incompetent before trial, during trial, and for sentencing purposes. The State contends the defendant waived this issue because it was not raised in the defendant's motion for new trial.

We agree with the State that this issue is waived. See T.R.A.P. 3(e). We also conclude that the trial court's failure to hold a competency hearing did not constitute plain error because consideration of this alleged error is not necessary to do substantial justice. Adkisson, 899 S.W.2d

at 642. The defendant is raising this issue for the first time on appeal. Although his brief asserts that “extensive evidence” of the defendant’s incompetence was available to the trial court, he does not specifically refer to anything in the record to support this assertion, as required by Tennessee Court of Criminal Appeals Rule 10(b). Nevertheless, we have reviewed the record in its entirety, and it does not show that the defendant was incompetent. The defendant is not entitled to relief on this issue.

**V. Indictment.** The defendant argues that the indictment for first degree murder was defective because it did not provide notice that he was charged with premeditated murder. The State contends the defendant waived this issue because it was not raised in his motion for new trial. The State also asserts that count two of the indictment properly notified the defendant that he was charged with first degree premeditated murder. We agree with the State that the defendant waived this issue. See T.R.A.P. 3(e). We also hold that use of the indictment did not constitute plain error because a clear and unequivocal rule of law was not breached. Adkisson, 899 S.W.2d at 641. Count two of the indictment states that the defendant, “unlawfully, intentionally, and with premeditation did kill Eric Williams, in violation of Tennessee Code Annotated § 39-13-202 . . .” The indictment sufficiently notified the defendant that he was being prosecuted for first degree premeditated murder, and therefore the defendant is not entitled to relief. See State v. Carter, 988 S.W.2d 145, 149 (Tenn. 1999); Ruff v. State, 978 S.W.2d 95 (Tenn. 1998) (holding that specific reference to a statute within the indictment may be sufficient to place the accused on notice of the charged offense). Accordingly, the defendant is not entitled to relief on this issue.

**Conclusion.** Based on the foregoing, the judgment of the trial court is affirmed.

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CAMILLE R. McMULLEN, JUDGE